Supreme Court, U.S.
FILED
FEB 14 2000
OFFICE OF THE CLERK

No. 99-944

In The

Supreme Court of the United States

The Honorable HELEN CHENOWETH, the Honorable BOB SCHAFFER, the Honorable DON YOUNG, and the Honorable RICHARD W. POMBO, all in their official capacities,

Petitioners,

v.

WILLIAM J. CLINTON, President of the United States, GEORGE T. FRAMPTON, JR., Acting Chair of the Council on Environmental Quality, individually and in their official capacities, and the UNITED STATES OF AMERICA,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

I. RESPONDENTS MISSTATE THE "QUESTION PRESENTED" AND MISCONSTRUE THE FACTS IN THEIR "STATEMENT."

A. The "Question Presented" Asks Whether Members Of Congress Have Standing To Challenge Unconstitutional Presidential Action That Usurps The Lawmaking Power Of Congress.

Respondents seek to recast the question presented to convert this case into a mere quibble over the extent of presidential authority under federal legislation. Contrary to Respondents' misstatement, this case involves presidential action that exceeds the authority set forth, not in federal statute, but in the Constitution.

In fact, the District Court, in ruling on Respondents' motion to dismiss, assumed that President Clinton's actions "unconstitutionally violated the Separation of Powers doctrine and the other constitutional provisions and statutes cited by [the Members]." *Chenoweth v. Clinton*, 997 F.Supp. 36, 37 (D.D.C. 1998).

B. Respondents' "Statement" Is Incorrect And Irrelevant.

Respondents assert, incorrectly, that the Members challenged President Clinton's Executive Order as "illegal" because "the President lacked statutory authority to establish the AHRI." Brief in Opposition, pp. 2-3. In fact, the Members argued that President Clinton's Executive Order was not only "illegal," but also unconstitutional, and that the President lacked not only "statutory authority," but also constitutional authority, to implement the AHRI by Executive Order. Petition, pp. 11-12.

Respondents present, irrelevantly, the ostensible purposes of the AHRI and their view that the actions to be taken under the AHRI are only "to the extent permitted by law." Brief in Opposition, p. 2. Respondents know that, for the purposes of their motion to dismiss, the

District Court was required to, and did, assume that the Members' allegations are true and that President Clinton's Executive Order is unconstitutional. *Chenoweth*, 997 F.Supp. at 37. Respondents know too, that for the purposes of this petition, President Clinton's Executive Order is unconstitutional. *Warth v. Seldin*, 422 U.S. 490, 501 (1975) (for purposes of ruling on a motion to dismiss for want of standing, the trial and reviewing courts must accept as true all material allegations of the complaint and must construe the complaint in favor of the complaining party).

Respondents' characterization of the holding of the District Court is in error. As much as Respondents would like the District Court to have engaged in the analysis adopted by this Court in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), the District Court did not do so. Instead, the District Court relied exclusively on the holding of this Court in *Raines v. Byrd*, 521 U.S. 811 (1997). "*Raines* directs [this Court to determine] whether the alleged injury suffered by [the Members] matches the vote nullification that took place in *Coleman*." *Chenoweth*, 997 F.Supp. at 39.

Respondents' characterization of the holding of the District of Columbia Circuit is also in error. The Circuit Court recognized that if it were to have applied its holding in *Moore v. United States House of Representatives*, 733 F.2d 946 (D.C. Cir. 1984), "this court presumably would have found [the Members'] injury sufficient to satisfy the standing requirement." *Chenoweth v. Clinton*, 181 F.3d 112, 116 (D.C. Cir. 1999). However, "after *Raines* [ ] we cannot." *Id.* Thus, the Circuit Court acknowledged what Respondents refuse to admit, that the Circuit Court held that with *Raines* this Court overturned the Circuit Court's precedents as to congressional standing. Thus, it was the holding of this Court in *Raines* that resulted in the Circuit Court's decision to uphold the District Court's *Raines*-based holding that the Members lack standing. Because that was the basis for the Circuit Court's decision, any speculation by the Circuit Court as to what it might have done had it held that the Members had standing was

obiter dicta and irrelevant to the granting of this petition. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998) (rejecting the "doctrine of hypothetical jurisdiction" and holding "[j]urisdiction is the power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause"). (Internal citation omitted).

II. THE FACTUAL ANALYSIS OF *COLEMAN v. MILLER*, NOT *RAINES v. BYRD*, APPLIES TO THE INSTANT CASE.

A. *Raines* Does Not Apply Here Because There Is A Vast Difference Between The Injury Suffered By The Members And The Injury Suffered By The Elected Officials In *Raines*.

Contrary to Respondents' assertion, the factual analysis engaged in by this Court in *Raines* does not apply here because what was at issue in *Raines* was an intra-legislative dispute not governed by any specific provision of the Constitution, not an inter-branch dispute governed by Article I, Section 7, and Article II, Section 3.

In *Raines*, Members of Congress were not denied their constitutionally guaranteed right to vote on the Line Item Veto Act before it became a law. *Raines*, 521 U.S. at 824. Therefore, because that Act began as a bill in Congress, not as an Executive Order in the White House, the elected officials in *Raines* were able to vote in the manner set forth in the Constitution. For this reason, the *Raines* Court held that the votes of the Senators and Representatives "were given full effect. They simply lost that vote." *Raines*, 521 U.S. at 824.

Here, the Members were not on the losing side of a vote in Congress. Rather, they were denied the "right and privilege under the Constitution to have their votes given effect" when they were denied the ability to vote to enact the AHRI. *Moore*, 733 F.2d at 953. By issuing Executive

Order 13061, President Clinton circumvented the Constitution and usurped from Congress the legislative authority expressly, specifically, and solely reserved to Congress by the Constitution. Thus, unlike *Raines*, this case is not a "mere intra-parliamentary controversy." *Coleman v. Miller*, 307 U.S. 433, 441 (1939).

The failure of the Circuit Court to apply the holding of this Court in *Coleman* creates a true, direct, intolerable, and irreconcilable conflict with that decision. This Court must grant this petition to resolve that conflict.

B. *Coleman* Applies To This Case.

Contrary to Respondents' assertion, *Raines* did not narrow the standing rule announced in *Coleman*. Moreover, the standing of legislators to challenge unconstitutional actions that nullify their votes, as this Court held in *Coleman*, provides the Members here with standing.

The Circuit Court concluded that under *Coleman* only "legislators whose votes would have been sufficient to defeat (or enact) a specific legislative act have standing to sue." *Chenoweth*, 181 F.3d at 116. The Circuit Court misunderstood *Coleman* because the Circuit Court set forth, not the rule, but the holding of *Coleman*. As explained in *Raines*, the *Coleman* Court held that the legislators had standing, under the rule of *Coleman*, because "their votes have been completely nullified," which they demonstrated by showing that their "votes would have been sufficient to defeat (or enact) a specific legislative act." *Raines*, 521 U.S. at 823.

Thus, the rule of *Coleman* is that, when the votes of legislators "have been completely nullified," the legislators have standing. However, there is no requirement for legislators to show that their votes would have been sufficient to defeat (or enact) a specific legislative act.[1]

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[1] Although the legislators in *Coleman* proved vote nullification by demonstrating that they had votes "sufficient to

Under *Coleman*, the Members need demonstrate only that their constitutionally guaranteed votes as Members of the House of Representatives "have been completely nullified" so as to support a claim of "a plain, direct and adequate interest in maintaining the effectiveness of their votes." *Coleman*, 307 U.S. at 438.

The failure of the Circuit Court to apply the holding of this Court in *Coleman* creates a true, direct, intolerable, and irreconcilable conflict with that decision. This Court must grant this petition to resolve that conflict.

III. RESPONDENTS' OTHER ARGUMENTS IN OPPOSITION TO THE GRANTING OF THIS PETITION HAVE NO MERIT.

A. Congressional Standing Exists In The Aftermath Of This Court's Decision in *Lujan*.

Respondents appear to argue that, in the aftermath of this Court's decision in *Lujan*, Members of Congress lack standing to challenge an unconstitutional action by the President. Brief in Opposition, p. 5.[2] That is not the case.

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defeat (or enact)" the legislative act, that may not be the exclusive means by which to demonstrate vote nullification. For example, the District Court held that the Members here suffered "a greater nullification of their voting power than that suffered by the plaintiffs in *Coleman*." *Chenoweth*, 997 F.Supp. at 39.

[2] Respondents misstate the basis upon which the Members claim personal injury and thus standing. The Members have suffered personal injury in that they were "denied the ability to exercise their lawmaking powers in the manner prescribed in the Constitution." Petition, p.12. In pointing out the constitutional importance of this petition, the Members set forth the holdings of this Court that the Separation of Powers doctrine exists to ensure the liberties of the people. Petition, pp. 13-15. As Respondents know, the reference to this Court's holdings in this regard was as a basis for granting the petition, not as a basis for the Members' standing.

Lujan requires only that a litigant "demonstrate a 'personal stake in the outcome.' " *Lujan*, 504 U.S. at 579 (Justice Kennedy, concurring). In the past, this Court and the District of Columbia Circuit have found such "personal stake" in the injury done to "senators, whose votes against ratification [were] overridden and virtually held for naught," *Coleman*, 307 U.S. at 438, and to "members of the [ ] House of Representatives" who were deprived of "the right to participate [in] and vote on legislation in a manner defined by the Constitution," *Moore*, 733 F.2d at 951. Contrary to Respondents' argument, *Lujan* must be read in a manner consistent with this Court's holding in *Coleman*, which upheld the standing of legislators to challenge nullification of their votes.

Moreover, the Circuit Court did not hold that the Members lacked standing based on *Lujan*, but based on the holding of this Court in *Raines*. Nonetheless, the Circuit Court has gone as far using *Raines*, as Respondents would have it go using *Lujan*, by holding that Members of Congress lack standing.[3] That was not the holding of this Court in *Raines*. Not only did this Court fail to overturn its earlier decision regarding the standing of legislators, it declined to rule as to the constitutionality of the various congressional standing decisions of the Circuit Court.[4] Thus the Circuit Court's decision is in true, direct, intolerable, and irreconcilable conflict with the holdings of this Court in both *Coleman* and *Raines*.

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[3] "[T]he portions of our legislative standing cases upon which the [Members] rely are untenable in light of *Raines*." *Chenoweth*, 181 F.3d at 115.

[4] This Court noted that the District of Columbia Circuit "has repeatedly recognized Members' standing to challenge measures that affect their constitutionally prescribed lawmaking powers." *Raines*, 521 U.S. at 816 (*quoting Byrd v. Raines*, 956 F.Supp. 25, 30 (D.D.C. 1997)). This Court expressed no opinion as to the constitutionality of that line of cases, stating, "We have never had occasion to rule on the question of legislative standing presented here." *Raines*, 521 U.S. at 820.

This Court must grant this petition to resolve that conflict.

B. The "Vast Difference" That Exists Between *Coleman* And *Raines* Does Not Exist Between *Coleman* And *Chenoweth*.

Respondents quote from this Court's holding in *Raines* as to the "vast difference between the level of vote nullification at issue in *Coleman*" and what was alleged in *Raines*. Brief in Opposition, p. 6. Such a "vast difference" existed as a result of this Court's holding that, in *Raines*, the Members' "votes were given full effect. They simply lost that vote." *Raines*, 521 U.S. at 824. Unlike *Raines*, in *Coleman* the votes of the legislators were not given "full effect." Instead, they were "overridden and virtually held for naught." *Coleman*, 307 U.S. at 438.

Any thoughtful comparison between this case and the *Coleman* and *Raines* decisions reveals that this case is like *Coleman* and unlike *Raines*. In fact, the District Court engaged in just that comparison and concluded that the Members here suffered "a greater nullification of their voting power than that suffered by the plaintiffs in *Coleman*." *Chenoweth*, 997 F.Supp. at 39.

Unfortunately, the Circuit Court declined to address this finding of the District Court and whether such nullification gave the Members standing under *Coleman*. Instead, the Circuit Court held that *Raines* overturned the Circuit's twenty-five years of precedent regarding congressional standing. In so doing, the Circuit Court ignored *Coleman* and the standing it provides the Members when their votes "have been completely nullified." Because the Circuit Court held that nothing remains of congressional standing following *Raines*, that decision creates a true, direct, intolerable, and irreconcilable conflict with the decision of this Court in *Coleman*. This Court must grant this petition to resolve that conflict.

C. Enactment Of Legislation In A Manner Contrary To That Provided For In The Constitution Is Never *De Minimis*.

Respondents argue that President Clinton's unconstitutional "enactment" of legislation by Executive Order "does nothing to prevent Members of Congress from debating or voting on any bill they wish, and it does not purport to alter the legal effect of their votes." Brief in Opposition, pp. 6-7. Respondents could not be more wrong. Although Members may debate and vote on any bill, including a "repeal" of President Clinton's Executive Order, the "legal effect of their votes" has been changed radically. Contrary to the Constitution, the Members may no longer enact legislation creating the AHRI. Instead, they must pass a law to "repeal" President Clinton's unconstitutional enactment of the AHRI. Moreover, because of a likely presidential veto, the Members must pass such legislation by a two-thirds margin. As Respondents know, this is not the manner in which "a bill becomes law." Presidents do not enact laws unless and until such legislation is repealed by a two-thirds margin of Congress.

Thus, Respondents argue that the President, without challenge from Members of Congress, may usurp the power of Congress to enact laws. As a result, Respondents render the Separation of Powers doctrine of no effect in providing a barrier between the Legislative and Executive. Ironically, having all but destroyed that Doctrine, Respondents resurrect it for use as a shield to prevent this Court from determining whether the Executive has breached the Doctrine. Respondents' assertion that the Doctrine shields it from the Judiciary, but does not shield the Legislative from the Executive, is not only erroneous, it is contrary to numerous holdings of this Court. *See, e.g., Printz v. United States*, 521 U.S. 898 (1997); *Metropolitan Wash. Airports Authority v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252 (1991). Respondents' argument must be rejected.

The failure of the Circuit Court to apply the holding of this Court in *Coleman* creates a true, direct, intolerable, and irreconcilable conflict with that decision. This Court must grant this petition to resolve that conflict.

D. The Conflict Asserted Is Between The Holdings Of This Court And The Holding Of The Court Of Appeals In *Chenoweth*.

Respondents argue that the conflict presented is an "intra-circuit conflict." Brief in Opposition, p. 8. This is wrong. The Circuit Court held that, although under its longstanding decisions regarding congressional standing it would have determined that the Members had standing, it could no longer do so as a result of *Raines*. *Chenoweth*, 181 F.3d at 116. Thus, it was the holding of this Court in *Raines* that caused the Circuit Court to conclude that this Court had overturned, by implication, all congressional standing decisions issued by the Circuit Court. It is the Circuit Court's decision in *Chenoweth* that is now the law of the District of Columbia Circuit. There is no intra-circuit split.

Moreover, contrary to Respondents' argument, the basis for the Circuit Court's decision was the holding of this Court in *Raines*. The Circuit Court's *dicta* as to what the Circuit Court might have done had it held that the Members had standing is irrelevant. Standing was denied to the Members as a result of the holding of this Court in *Raines*, contrary to the express and narrow holding of this Court in *Raines* and in conflict with the holding of this Court in *Coleman*. This Court must grant this petition to resolve that conflict.

E. Judge Tatel's Opinion Is Irrelevant.

Respondents cite to Judge Tatel's concurring opinion in which Judge Tatel opines that had he written the opinion of the Circuit Court, he would have held that the Members lacked standing under *United Presbyterian Church in the U.S.A. v. Reagan*, 738 F.2d 1375 (D.C. Cir.

1984). *Chenoweth*, 181 F.3d at 118. But Judge Tatel did not write the opinion of the Circuit Court. Instead, the opinion of the Circuit Court concluded that, although the Members had standing under *Moore* and other related decisions of the Circuit Court, the decision of this Court in *Raines* overturned *Moore* and those decisions. *Chenoweth*, 181 F.3d at 116.

Although Judge Tatel appears to conclude that something is left of the District of Columbia Circuit's jurisprudence regarding congressional standing, the Circuit Court did not so conclude. Instead, the Circuit Court concluded that nothing remains after *Raines*. *Chenoweth*, 181 F.3d at 116. Thus, the Circuit Court's opinion creates a true, direct, intolerable, and irreconcilable conflict with the decisions of this Court in *Raines* and *Coleman*. This Court must grant this petition to resolve that conflict.

CONCLUSION

Respondents have failed to refute a single argument set forth in the Members' petition as to why the petition should be granted. Because this matter is one of exceptional constitutional importance on which this Court has never ruled and because the decision below is in true, direct, intolerable, and irreconcilable conflict with the holdings of this Court, this Court must grant the petition.

Respectfully submitted,

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